NOT YET SCHEDULED FOR ORAL ARGUMENT

Nos. 18-1082, 18-1117

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PLANNED BUILDING SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF OF INTERVENOR SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing in this court are listed in the Brief for Petitioner/Cross-Respondent, Planned Building Services, Inc. ("PBS").

B. Rulings Under Review. References to the ruling at issue appear in the Brief for PBS.

C. Related Cases. The ruling at issue has not previously been before this court or any other court, and there are no pending related cases, but the NLRB's decision was issued pursuant to a remand order from the Second Circuit in *Service Employees International Union, Local 32BJ v. NLRB,* 647 F.3d 435 (2d Cir. 2011).

CORPORATE DISCLOSURE STATEMENT

Intervenor, Service Employees International Union, Local 32BJ ("Local 32BJ"), a labor organization, is an unincorporated association. Pursuant to Fed.R.App.P. 26.1, Local 32BJ certifies that it has no parent companies and there is no publicly-held company that owns 10% of its stock, as it is not a corporation.

Dated: December 17, 2018

/s/

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JURISDICTIONAL STATEMENT

Intervenor, Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") agrees with PBS's jurisdictional statement, except that the Court lacks jurisdiction over issues that PBS did not first raise to the Board. *Chevron Mining, Inc. v. NLRB,* 684 F.3d 1318, 1329-30 (D.C. Cir. 2012).

ISSUES PRESENTED

1. Did the National Labor Relations Board deprive Planned Building Services ("PBS") of due process when it found that PBS was an individual successor employer to the predecessor employer, Clean-Right, where (1) the joint successorship issue that was actually litigated was in practical terms identical to the individual successorship issue; and (2) PBS never established before the Board how the General Counsel's failure to specifically allege that PBS was an individual successor led PBS to alter its conduct at the hearing to its detriment.

2. Does the mere passage of time from the Second Circuit's remand until the Board issued its decision provide grounds for refusing to enforce the Board's order where the Board's remedy covers a fixed time period that did not increase as a result of the lapse of time?

3. Did PBS waive certain arguments by failing to first present them to the Board, or by failing to raise them in a procedurally appropriate manner?

STATUTES AND REGULATIONS

Except for 29 C.F.R. §102.46, which is set forth in an Addendum, all applicable statutes are contained in the Brief for the NLRB.

STANDARD OF REVIEW

Local 32BJ agrees with the Board's statement of the applicable standard of review.

SUMMARY OF ARGUMENT

This Court has recognized that the NLRB may find and remedy a violation that was not specifically alleged in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1200 (D.C. Cir. 2003). Here, after a remand from the Second Circuit, the Board reasonably concluded that the question of whether PBS was an individual successor to the predecessor cleaning contractor met both of these tests. PBS has utterly failed to show how the absence of a specific allegation deprived it of the opportunity to present relevant evidence or caused it alter its conduct at the hearing to its detriment.

PBS has waived its argument that it had no obligation to bargain with Local 32BJ because Local 32BJ never made a bargaining demand. Even if the argument had not been waived, it is meritless because under settled Board law, Local 32BJ had no obligation to make the empty gesture of a bargaining demand where PBS's

unlawful refusal-to-hire wrongfully deprived the Union of its majority status.

PBS's argument that the Court should deny enforcement due to the Board's delay in issuing its decision is meritless. As the Supreme Court explained in *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers." *Id.* at 265. Here, the Board's remedy covers a finite period of time, from April 25, 2000 to June 15, 2001. In contrast to the cases cited by PBS, where subsequent events made it impractical or unjust to impose the Board's chosen remedy, here there is nothing unreasonable about requiring PBS to pay workers fourteen months of backpay to remedy its illegal acts.

The Board's order measures PBS's fourteen months of backpay liability in accordance with the predecessor employer's terms and conditions. While PBS calls this an "open issue," this standard remedy has been in place for 40 years and has been approved by every circuit court that has considered it. Moreover, PBS has failed to develop any argument as to why this remedy is improper.

PBS has waived its two additional arguments regarding the Board's remedy. PBS complains about the Board's award of compound interest and its requirement that PBS compensate workers for any adverse tax consequences resulting from the backpay awards. The Board was applying both of these remedies at the time PBS

submitted its position statement on remand from the Second Circuit, yet PBS did not raise either argument at that time. PBS did not even raise the compound interest argument in its motion for reconsideration. Thus, in accordance with Section 10(e) of the Act, 29 U.S.C. §160(e), this Court lacks jurisdiction to consider these arguments.

STATEMENT OF THE CASE

A. Relevant Facts.

On April 25, 2000, Planned Building Services ("PBS") was awarded a contract to provide maintenance services at 80-90 Maiden Lane in Manhattan. Joint Appendix ("JA") 83. A company called Clean-Right that had a collective bargaining agreement with Service Employees International Union, Local 32BJ ("Local 32BJ" or "the Union") had previously provided maintenance services at the building. The NLRB found, and PBS does not contest, that PBS illegally discriminated against the former Clean-Right employees in violation of Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. §158(a)(3), by refusing to hire them or to consider them for hiring. JA 88.

Shortly after it began providing services at 80 Maiden Lane, PBS entered into a contract with a labor organization called United Workers of America ("UWA") covering the employees at 80-90 Maiden Lane and at a nearby building, 75 Maiden Lane. JA 109. The Board found, and PBS does not contest, that PBS

provided unlawful assistance to UWA, and thus, PBS's recognition of UWA was illegal. JA 153; 158. There was no significant "day-to-day interchange between PBS employees at 80-90 Maiden Lane and at other locations." JA 196. In a prior Board case involving three other buildings in Manhattan, PBS admitted that single-site units were appropriate. JA 195, n. 33, *citing Planned Building Services*, 347 NLRB 670, 678, 717 (2006).

PBS lost its contract at 80-90 Maiden Lane effective June 15, 2001. JA 197.

B. Procedural History.

PBS's discussion of the procedural history presents a misleading time line. The NLRB's brief contains a detailed discussion of the procedural history that we will not repeat, but we will add certain relevant facts and highlight some others mentioned in the Board's brief.

This case began with a charge filed by Local 32BJ on July 18, 2000. JA 1. In that charge, the Union alleged that PBS violated Sections 8(a)(1),(2),(3), and (5) of the Act by discriminating against employees previously represented by Local 32BJ, by providing unlawful assistance to another labor organization, and by refusing to recognize and bargain with Local 32BJ. *Id.*

On September 27, 2000, Local 32BJ filed an amended charge naming PBS as a joint employer with AM Property Holding Corp. ("AM Property") and two

related entities. JA 2-3. The Union later filed more charges against PBS and AM Property, both separately and as joint employers. The Regional Director issued an amended complaint on January 11, 2002 that formed the basis for a hearing before an Administrative Law Judge. JA 4-20.

The amended complaint accused PBS of refusing to hire individuals who had previously worked for Clean-Right because those individuals were members of and assisted Local 32BJ. JA 11 at ¶¶ 11(a) and (b). The amended complaint further alleged that a bargaining unit consisting of building maintenance workers at 80-90 Maiden Lane was an appropriate bargaining unit. JA 9 at ¶¶8(b) and (c). In addition, the amended complaint alleged that AM Property and PBS were joint employers, and they had jointly failed and refused to recognize and bargain with Local 32BJ. JA 12 at ¶ 13. In its Answer to the Complaint, PBS asserted that the appropriate unit consisted of both 80-90 Maiden Lane and 75 Maiden Lane. JA 24 at ¶ 8(c). On the very first day of the hearing before the ALJ, Counsel for the General Counsel asserted that she was seeking documents from PBS relating to its contract at 75 Maiden Lane because those documents were relevant to PBS's defense that a bargaining unit combining 75 Maiden Lane and 80-90 Maiden Lane was the appropriate bargaining unit. JA 38. When the ALJ asked PBS's counsel, "Are you alleging that the appropriate unit is combined with 75 and 80-90," PBS's attorney replied, "We don't really think it makes a difference – single or double."

JA 39.

In 2007, the NLRB issued its first decision in this case. The Board found that PBS had illegally refused to hire the former Clean-Right employees, but it also found that AM Property and PBS were not joint employers. The Board then asserted that it was "precluded from considering whether AM or PBS individually was a successor to Clean-Right with an obligation to recognize 32BJ because the General Counsel has not litigated a violation based on that theory." JA 87. After an unsuccessful motion for reconsideration, Local 32BJ then filed a petition for review in the Second Circuit, arguing that the Board had applied the wrong legal standard when it stated that it was "precluded" from considering whether PBS was a successor to Clean-Right.

In 2011, the Second Circuit issued its decision on Local 32BJ's petition for review. The court agreed that under *Pergament United Sales*, 296 NLRB 333, 334 (1989) *enf'd.* 920 F.2d 130 (2d Cir. 1990), the Board was not precluded from finding that PBS was an individual successor with an obligation to bargain with Local 32BJ. The court remanded the case to the Board to determine "whether the issue of PBS's status as an individual successor to Clean-Right had been fully litigated and was sufficiently related to the underlying complaint such that finding a violation on that ground would comport with due process." JA 178. The court further directed the Board to apply its presumption that a bargaining unit consisting

of workers at a single facility is an appropriate unit or articulate why this presumption is inapplicable. JA 180.

After the Second Circuit issued its decision, the parties engaged in extended settlement discussions, and as a result, they did not submit position statements on remand until February 2013. In the position statement that PBS submitted on remand, it argued that if there had been a specific individual successor allegation, it would have put in evidence that "PBS' New York City-area employees are subject to virtually identical work rules, discipline procedures, and supervisory structure" to defeat a claim that the single facility unit was appropriate. JA 187. PBS did not point to any other additional evidence that it would have submitted. PBS argued for the Board to remand the case to an ALJ to develop the record, but it did not make any further offer of proof regarding the evidence it would present if the Board granted its request.

For six months after the parties submitted their briefs to the Board on remand, the NLRB did not have a quorum. Further, in June 2014, the Supreme Court decided *NLRB v. Noel Canning*, ___ U.S. ____, 134 S.Ct. 2550 (2014), invalidating the recess appointments of three Board Members. This required the Board to reconsider all of the decisions that had been issued during the year-long tenure of those three Board Members. The Board issued its decision on remand in this case on December 15, 2017.

The Board, with Chairman Miscimarra dissenting, held that the issue of individual successorship was closely connected to the subject matter of the complaint and that it was fully and fairly litigated. The Board further found that due process considerations did not bar it from deciding, based on the record before it, that PBS was an individual successor to Clean-Right. The Board went on to find that PBS was a successor to Clean-Right, and that it violated the Act by failing to recognize and bargain with Local 32BJ, and it ordered a remedy for that violation.

After PBS filed an unsuccessful motion for reconsideration, this appeal followed.

ARGUMENT

A. The Individual Successor Issue Was Closely Connected to the Allegations in the Complaint and Was Fully Litigated.

In *Casino Ready Mix, Inc. v. NLRB,* 321 F.3d 1190, 1200 (D.C. Cir. 2003), this Court endorsed the Board's rule set forth in *Pergament United Sales,* 296 NLRB 333, 334 (1989) *enf'd.* 920 F.2d 130 (2d Cir. 1990) that "the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated." In *Casino Ready Mix,* the Board found that a threat made by the company president was an unfair labor practice even though the complaint did not include that allegation. This Court upheld the Board's finding as

consistent with *Pergament,* finding that the issue was "closely connected" to the subject matter of the complaint for three reasons: (1) the complaint alleged that a similar threat by a supervisor was unlawful; (2) the complaint alleged that the company president was the company's agent; and (3) the complaint alleged that the company discriminated against union members, and illegal threats would establish animus toward the union. This Court further found that the company had the opportunity to fully litigate the issue because it did not object to testimony about the threat, and even though it did not cross-examine the witness who testified about the threat, it could have done so.

When the Second Circuit remanded this case to the NLRB, it instructed the Board to apply the *Pergament* test. Contrary to PBS's assertions, the test does not require the analysis to be done in any particular order, and nothing in the Second Circuit's decision can reasonably be construed as a "directive" that the Board first consider whether the issue had been "fully litigated," and only then consider if the issue was "closely connected" to the subject matter of the complaint.

The Board's decision here easily satisfies the *Pergament/Casino Ready Mix* test.

1. The Individual Successor Issue is Virtually Identical to the Joint Successor Issue That Was Originally Litigated.

As the Board explained in its decision, "[t]he issue of single successorship is not only 'closely related' to the complaint allegation of joint successorship, it is in

all practical terms identical." JA 192. The successorship test – whether single or joint – has two elements: "(1) whether a majority of the new employer's work force in an appropriate unit are former employees of the predecessor employer; and (2) whether the new employer conducts essentially the same business as the predecessor." JA 124, *quoting Sierra Realty Corp.*, 317 NLRB 832, 835 (1995). When an employer has been found to engage in a discriminatory refusal to hire the predecessor's employees, the Board presumes that the union's majority status would have continued. *Id.*

By alleging that PBS and AM Property were joint successors, the General Counsel was required to prove the elements of successorship and *also* that the two entities were joint employers. PBS's assertion that its defense focused on whether it was a joint employer with AM Property, rather than on whether it was a successor to Clean-Right is simply not true.[1] In fact, PBS did vigorously contest both the successorship issue and the joint employer issue. In its brief to the ALJ, PBS devoted 35 pages to its argument that it did not engage in a discriminatory refusal to hire the predecessor's employees. JA 41-77. This argument was directly relevant to the individual successorship issue. PBS argued that it was not a

[1] Tellingly, PBS did not make this argument in its brief on remand to the Board. Instead, it only latched on to this claim after Board Chairman Miscimarra suggested in his dissent that "PBS could have reasonably chosen a litigation strategy aimed at defeating the General Counsel's case on the threshold joint-employer issue." JA 203.

successor because "PBS did not discriminatorily refuse to hire the former [Clean-Right] employees, and for lawful reasons the alleged discriminatees never constituted a majority of PBS' workforce at 80 Maiden Lane." Supplemental Appendix ("SA") 8. Likewise, in its brief to the Board in support of its exceptions, PBS argued that "[t]he Board must reverse the ALJ's successorship finding as it is premised on the erroneous conclusion that PBS excluded the former Clean-Right employees from its hiring process. PBS was also not a successor under any other legal theory, and therefore did not violate §8(a)(5) of the Act by not recognizing and bargaining with Local 32BJ." JA 80.

PBS focused its defense on the refusal to hire because it had nothing helpful to say regarding the second prong of the successorship test –whether the new employer conducts essentially the same business as the predecessor, also known as the "substantial continuity" test. The ALJ found that "the Clean-Right employees were replaced by AM and PBS employees performing essentially the same work in the same building in the same manner with no hiatus in operations." JA 124. This is exactly the same finding the ALJ would have made if the question was whether AM and PBS were individual successors to Clean-Right. PBS has never made an offer of proof as to what additional evidence it would have provided in support of its claim that there was no "substantial continuity" between it and Clean-Right. Instead, PBS points to evidence already in the record that it gave an additional

assignment to one worker, and, in contrast to Clean-Right, it did not employ an elevator operator or a day porter. As the NLRB has pointed out in its brief, PBS has waived the argument regarding the diminution of the unit by failing to present it to the Board. At any rate, the Board's explanation that these are not the types of changes in operation that defeat a claim of "substantial continuity" is consistent with this Circuit's precedent. JA 192, n. 12, and JA 193, n. 18. In *Pennsylvania Transformer Technology, Inc. v. NLRB*, 254 F.3d 217, 223 (D.C. Cir. 2001), this Court held that imposing some additional responsibilities and requiring increased employee flexibility is not enough to defeat substantial continuity. Similarly, in *Community Hospitals of Central California v. NLRB*, 335 F.3d 1079, 1083-84 (D.C. Cir. 2003), changes in nurses' duties and the adoption of a "partner model" of patient care were not enough to negate "substantial continuity." This Court has likewise endorsed the Board's rule that substantial continuity exists even where "a successor employer has taken over only a discrete portion of the predecessor's bargaining unit." *Dean Transportation, Inc. v. NLRB*, 551 F.3d 1055, 1062 (D.C. Cir. 2009).

2. The Appropriateness of the Bargaining Unit Was Fully Litigated.

In remanding the case, the Second Circuit ordered the Board to "apply its single-facility presumption or articulate why this presumption is inapplicable." JA 182. The Board found that the preexisting single-facility bargaining unit remained

presumptively appropriate after the change in employers. JA 195. And PBS failed to make any offer of proof to establish that it had evidence available to rebut this presumption that it would have introduced if only the General Counsel had specifically alleged that it was an individual successor to Clean-Right.

The Board found on remand that "[t]he parties made an extensive record at the hearing concerning PBS's operations at 80-90 Maiden Lane … and the appropriateness of the bargaining unit." JA 193. In its Answer to the Complaint, PBS had asserted that the appropriate unit consisted of both 80-90 Maiden Lane and 75 Maiden Lane. PBS was estopped from arguing that a larger unit was necessary since it had entered into a collective bargaining agreement with United Workers of America covering those two buildings. JA 109. At the hearing, when Counsel for the General Counsel sought documents regarding 75 Maiden Lane because they were relevant to the dispute over the appropriate bargaining unit, PBS's counsel replied that he didn't think it made a difference whether the bargaining unit consisted of both buildings or just 80-90 Maiden Lane. JA 39. Nevertheless, because PBS would not stipulate that the workers at 80-90 Maiden Lane constituted an appropriate bargaining unit, Counsel for the General Counsel put in extensive evidence on this point, including testimony that the 80-90 Maiden Lane workers were "rarely if ever assigned to work at 75 Maiden Lane," and that "PBS employees at 75 Maiden Lane 'never' worked at 80-90 Maiden Lane." JA

196.

On remand from the Second Circuit, PBS argued that "only a multi-location unit is appropriate," JA 186-87, although it did not even fully describe the scope of that unit.[2] As the Board pointed out in its decision, in a case that was litigated around the time of the events at issue here, PBS admitted, and the Board found, that separate bargaining units for each of three Manhattan buildings were appropriate. JA 195, n. 33; *Planned Building Services*, 347 NLRB 670, 678, 717 (2006). Here, PBS made no attempt to show that its operations at 80-90 Maiden Lane differed from its operations at those other buildings. JA 195.

If there were any facts that would rebut the presumption that a single location unit was appropriate, those facts would be entirely within PBS's own knowledge and control, and thus, PBS has no excuse for its failure to at least make an offer of proof as to what those facts are. The appropriateness of the bargaining unit was fully and fairly litigated.

B. The Board's Ruling Comports With Due Process.

PBS argues that it was denied due process because it might have pursued a different litigation strategy if the General Counsel had included the specific

[2] A bargaining unit limited to just 75 Maiden Lane and 80-90 Maiden Lane would have done PBS no good because PBS only had six employees at 75 Maiden Lane, SA 1, so the twelve former Clean-Right employees would have also constituted a majority of that larger unit.

individual successor allegation in the Amended Complaint. But, this argument fails because, as the Board explained, PBS offered no meaningful additional exculpatory evidence that it would have presented if there had been a specific individual successor allegation. JA 192-93.

This Circuit's decision in *Bellagio, LLC v. NLRB*, 854 F.3d 703 (D.C. Cir. 2017) lends no support to PBS. In *Bellagio*, the Board found a violation that was not alleged by the General Counsel, and this Court decided the finding was not consistent with due process because the employer would have cross-examined the key witness differently if it had been on notice of the allegation. *Bellagio*, 854 F.3d at 713. Of course, in *Bellagio*, the panel did not overrule *Casino Ready Mix*, and in *Casino Ready Mix*, this Court held that the absence of a specific allegation in the complaint did not preclude the Board from finding and remedying a violation. *Casino Ready Mix*, 321 F.3d at 1199-1200.

The question in *Bellagio*, *Casino Ready Mix*, and here is whether the absence of the specific allegation deprived the employer of the opportunity to fully litigate the issue. The approach the Board took in *Pergament* is instructive. There, the Board looked to whether "the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether the respondent would have altered the conduct of its case at the hearing had a specific allegation been made." *Pergament*, 296 NLRB at 335. In *Pergament*, the employer argued that it

would have called two additional witnesses if it had been given notice of the additional allegation. *Id.* The Board denied the employer's due process claim based on its finding that the evidence from those witnesses would not have improved the employer's position. *Id.* The Board took the same approach here. To prevail on its due process claim, it's not enough for PBS to make a conclusory assertion that it could provide additional evidence. The Board rightly recognized that to prevail on its due process claim, PBS was required to show what additional evidence it would have offered, or how it would have conducted its case differently so that the outcome would have been different. JA 192-93.

C. PBS's Discriminatory Refusal to Hire Made a Bargaining Demand Futile.

On remand from the Second Circuit, PBS argued for the first time that the Board could not impose a bargaining obligation on it because Local 32BJ never made a bargaining demand. There is no reason why PBS should have been allowed to raise that issue for the first time at that late stage since this defense has been available to PBS from the outset. This Court has held that "to preserve objections for appeal, a party must raise them in the time and manner that the Board's regulations require." *Spectrum Health – Kent Community Campus v. NLRB*, 647 F.3d 341, 349 (D.C. Cir. 2011). The Board's regulations provide that "[m]atters not included in exceptions … may not thereafter be urged before the Board, or in any further proceeding." 29 C.F.R. § 102.46(f). PBS could have

raised this issue in its initial objections to the ALJ decision, yet it failed to do so.

At any rate, the argument is meritless. As the Board has explained here, and in earlier cases, PBS's unlawful refusal to hire the Clean-Right employees made any bargaining demand futile. JA 196, n. 36; *Smith & Johnson Construction Co.*, 324 NLRB 970, 970 (1997)("It would be incongruous to require the Union to request the Respondent to recognize it when the work force the Respondent actually employed, by virtue of its discriminatory hiring process, included only one [of the predecessor's] employee[s]"); *Precision Industries*, 320 NLRB 661, 711 (1996)("Respondent may not now claim that the Union did not officially demand recognition. Its calculated effort to destroy the representational status of the Union by virtue of an unlawful hiring process rendered any such effort a futility"), *enf'd. sub nom. Pace Industries Inc. v. NLRB,* 118 F.3d 585 (8th Cir. 1997).

When an employer conducts its hiring in a lawful manner, the union may make a bargaining demand when it believes that it represents a majority of the employees in a bargaining unit. But here, the employer's illegal acts prevented the Union from being in a position to make a bargaining demand. The Board's long established rule that an employer's illegal hiring scheme makes it unnecessary for a union to make an empty gesture of demanding bargaining is entirely reasonable.

D. The Board's Unfortunate Delay is Not a Reason to Deny Enforcement.

Relying upon out-of-Circuit authority involving vastly different

circumstances, PBS argues that the Board's unfortunate delay in issuing its decision is grounds for denying enforcement of the Board's order. This argument is foreclosed by *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258 (1969), and by this Court's decisions in *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir. 1989) *cert. denied* 498 U.S. 817 (1990); *Southwest Merchandising Corp. v. NLRB*, 943 F.2d 1354 (D.C. Cir. 1990); and *Dayton Tire v. Secretary of Labor*, 671 F.3d 1249 (D.C. Cir. 2012).

In *Rutter-Rex*, the employer illegally refused to reinstate workers following a strike, and the Board ordered the employer to pay back wages. After the decision on the merits, it took the Board several years to issue a backpay specification. The Court of Appeals modified the NLRB's order to shorten the backpay period due to the Board's "inordinate delay." *Rutter-Rex*, 396 U.S. at 262. The Supreme Court reversed that decision, and upheld the Board's order. The Court explained that "[w]ronged employees are at least as much injured by the Board's delay in collecting their back pay as is the wrongdoing employer," *id.* at 264, and "the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. *Id.* at 265.

The facts in *Consolidated Freightways* are strikingly similar to the facts here. In *Consolidated Freightways*, it took the Board six years after a remand to

issue a decision imposing backpay liability. *Consolidated Freightways*, 892 F.2d at 1059. Without condoning the Board's delay, this Court enforced the order, explaining that "our failure to enforce it would return the burden to the wrong shoulders." *Id.* Similarly, in *Southwest Merchandising*, this Court held that a four-and-a-half year delay between the ALJ's decision and the Board's decision was not grounds for denying enforcement of the Board's order. 943 F.2d at 1357-58. The employer in *Southwest Merchandising* had attempted to distinguish *Rutter-Rex* on the grounds that *Rutter-Rex* involved delay at the compliance stage rather than the merits stage, but the Court rejected that distinction. *Id.* at 1358. And, in *Dayton Tire*, while the Court found that the agency's twelve-year delay was "excessive and deplorable," it held that the delay did not justify denying enforcement of a monetary penalty. *Dayton Tire*, 671 F.3d at 1253.

The cases relied upon by PBS – *Emhart Indus., Hartford Div. v. NLRB*, 907 F.2d 372 (2d Cir. 1990) *Olivetti Office U.S.A. v. NLRB*, 926 F.2d 181 (2d Cir. 1991), and *TNS, Inc. v. NLRB*, 296 F.3d 384 (6th Cir. 2002) are easily distinguished from the facts here.

In *Emhart*, the Second Circuit denied enforcement on the merits, so its discussion of the Board's delay was *dicta*. Moreover, the court took note of what it described as "the majority view" that "denying enforcement on the ground of delay alone unfairly punishes employees for the Board's nonfeasance." 907 F.2d at 379.

The court then expressed its view that in the particular circumstances of that case, where the employer and the union had signed two different collective bargaining agreements addressing the same issues raised in the Board proceeding, enforcing the Board's order would not "effectuate any reasonable policy of the act." *Id.*

Olivetti similarly involved a case where, after the Board issued its decision, the employer and the union entered into a collective bargaining agreement. The Board had found that the employer had a duty to bargain over its decision to subcontract and relocate certain work, and that it violated that duty by implementing its subcontracting and relocation plan before reaching impasse. But, while the case was pending, the union and the employer entered into a new contract containing an agreement regarding the effects of the work-transfer decision. The Second Circuit held that in light of this agreement, it would be unjust to order the employer to pay six years of backpay. *Olivetti* is easily distinguishable for two reasons. First, here there has never been an agreement between Local 32BJ and PBS addressing the matters at issue in this case. Second, in contrast to *Olivetti*, where the backpay continued to accrue throughout the Board's delay, here the backpay period cut off on June 15, 2001.

In *TNS*, the Sixth Circuit declined to enforce the Board's order because back pay had been mounting over 18 years while the case was pending, and the employer alleged that its operations had changed so much during that time that

reinstatement would be unrealistic. *TNS*, 296 F.3d at 404. But, in reaching that decision, the court explained that regardless of any delay, it would enforce a Board decision where the delay did not prejudice the employer or give the Board or the union an unfair advantage. *Id.* at 403.

Here, contrary to PBS's assertions, the Board's delay[3] has not prejudiced PBS. The Board's order in this case only involves the payment of money and the posting of notices. There is no obligation to bargain. Moreover, the amount of principal owed has not increased since 2001. In fact, due to inflation, the real value of the principal owed has declined significantly over the last 17 years.[4] Despite its overblown rhetoric, PBS's only real complaint is that the Board is seeking interest on the money that PBS owes. But, as the Supreme Court has explained "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. U.S.*, 479 U.S. 305, 310, n. 2 (1987). The award of

[3] At least some portion of the delay was due to litigation that was beyond the Board's control. When the Supreme Court issued its *Noel Canning* decision, finding that the recess appointments of three Board Members were unconstitutional, the newly appointed Board Members were required to reconsider the decisions issued during the tenure of those recess appointees.

[4] The Court may take judicial notice that, according to the Bureau of Labor Statistics, inflation has increased by 47% from April 2000 to September 2018. See https://data.bls.gov/cgi-bin/cpicalc.pl?cost1=100&year1=200004&year2=201809

interest here does not justify denying enforcement of the Board's order.

E. The Remedy Ordered by the Board is Reasonable.

For 40 years the Board has held that where a successor employer has unlawfully refused to hire its predecessor's employees, the employer loses the right to set initial terms and conditions of employment. *Love's Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979) *enf'd. in relevant part* 640 F.2d 1094 (9th Cir. 1981). PBS's description of this as an "open issue" is baffling. In *Capital Cleaning Contractors, Inc. v. NLRB*, 147 F.3d 999, 1008 (D.C. Cir. 1998), this Court agreed that "when a successor refuses to hire its predecessor's employees based upon anti-union animus, the successor loses the right unilaterally to set initial terms and conditions of employment." In reaching this conclusion, the Court noted that it was "join[ing] every other court to have considered the issue."[5]

[5] In *Capital Cleaning*, this Court found that on the particular facts of that case the Board had failed to justify imposing that remedy for the entire period (six years and still running) since the successor began providing services at the site. But here, the duration of the remedy was only fourteen months – from the time PBS started providing services at 80-90 Maiden Lane in April 2000 until it lost the contract in June 2001. Further, in *Pressroom Cleaners*, 361 NLRB No. 57 (2014), the Board provided additional justification for this remedy. If PBS intended to argue that *Capital Cleaning* should be applied to further limit the remedy, PBS's oblique reference to a footnote in Chairman Miscimarra's dissent is insufficient to preserve that argument. *See New York Rehabilitation Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007)(argument waived even though it was raised in an argument heading; "it is not enough to mention a possible argument in the most skeletal way"); *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 314 (D.C. Cir. 2003)("asserted but unanalyzed contention" insufficient to preserve issue on appeal); *Washington Legal Clinic for the Homeless v. Barry*, 107 F.3d 32,

Id., *citing Pace Industries,* 118 F.3d at 593-94; *U.S. Marine Corp. v. NLRB,* 944 F.2d 1305, 1320 (7th Cir. 1991)(*en banc)*; *American Press, Inc. v. NLRB,* 833 F.2d 621, 624-25 (6th Cir. 1987); *Shortway Suburban Lines, Inc.* 286 NLRB 323, 328 (1987) *enf'd. mem.* 862 F.2d 309 (3d Cir. 1988). Although not mentioned in *Capital Cleaning,* the Second Circuit has also approved of this remedy in *NLRB v. The Staten Island Hotel Ltd. Partnership,* 101 F.3d 858, 861-62 (2d Cir. 1996). And more recently, the Fifth Circuit has added to this unanimity in *Adams & Assocs. v. NLRB,* 871 F.3d 358, 374-75 (5th Cir. 2017).

The Board requires the discriminating employer to restore the predecessor's terms and conditions as a means of resolving "any uncertainty as to what the [employer] would have done absent its unlawful purpose." *Love's Barbeque,* 245 NLRB at 82. As this Court explained in *Capital Cleaning,* where the employer's unlawful refusal-to-hire makes it difficult to determine what would have happened if not for the discrimination, "it is only reasonable for the Board to presume that the successor would have hired a majority of union members and therefore had an obligation from the outset to bargain with the union rather than unilaterally setting the terms of employment." *Capital Cleaning,* 147 F.3d at 1008. There is no reason not to apply this long-settled remedy here.

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39 (D.C. Cir. 1997)(declining to address issue that was not included in statement of issues and only supported with "bare-bones arguments").

F. PBS Has Waived Any Objection to the Board's Award of Compound Interest.

PBS complains about the Board's application of its decision in *Kentucky River Medical Center*, 356 NLRB 6 (2010), imposing compound interest on the principal due to the workers and the benefit funds. In *Kentucky River*, the Board convincingly explained its rationale for awarding compound interest, but there is no need for the Court to consider the merits of the argument because PBS has waived this argument by failing to raise it to the Board.

PBS submitted its post-remand brief to the Board in 2013, more than two years after the *Kentucky River* decision. Yet, PBS did not raise the compound interest issue in that brief. PBS did not even raise it in its motion for reconsideration. Thus, this Court lacks jurisdiction to consider this argument. 29 U.S.C. §160(e); *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 665-66 (1982); *Chevron Mining, Inc. v. NLRB*, 684 F.3d 1318, 1329-30 (D.C. Cir. 2012)(finding that failure to raise an issue to the Board deprives the court of jurisdiction).

G. PBS Has Waived Any Objection to Compensating Workers for Adverse Tax Consequences.

PBS claims that it is unfair to require it to compensate workers for any adverse tax consequences of receiving backpay in a lump sum. While PBS asserts that this remedy is based on a 2016 Board decision, in fact, the Board originally

announced this remedy in 2012 in *Latino Express, Inc.*, 359 NLRB 518 (2012). Although *Latino Express* was vacated as a result of the Supreme Court's decision in *Noel Canning*, it was the controlling law when PBS filed its post-remand brief in 2013. Thus, PBS should have raised any objection to the remedy at that time. While PBS did raise this issue in its motion for reconsideration, by then it was too late, since it is failed to establish any "extraordinary circumstances" that would have justified raising the issue for the first time in a motion for reconsideration. *See Parkwood Development Ctr., Inc. v. NLRB*, 521 F.3d 404, 410 (D.C. Cir. 2008)(finding issue barred by Section 10(e) where it was raised for the first time in a motion for reconsideration).[6]

[6] Even if the argument had not been waived, there is no "manifest injustice" in requiring PBS to compensate the workers for the adverse tax consequences. *See Consolidated Freightways*, 892 F.2d at 1058 ("As a general principle, new rules announced in agency adjudications may be applied retroactively absent any 'manifest injustice."). This is not a case where conduct that was lawful at the time retroactively became illegal. PBS is not claiming that it was willing to discriminate against the workers if the only consequence was backpay, but not if it knew that it would have to compensate them for adverse tax consequences.

CONCLUSION

The Court should deny PBS's petition for review, and enforce the Board's Order in full.

Dated: December 17, 2018

/s/

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CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 32(e)(2)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Circuit Rule 32(e)(2)(B) because excluding the parts of the brief exempted by Fed.R.App.P. 32(f), this brief contains 6,546 words,

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type-style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Dated: December 17, 2018

/s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2018, the foregoing Brief of Intervenor Service Employees International Union, Local 32BJ was served on all parties or their counsel of record through the CM/ECF system.

/s/_____
Andrew L. Strom
Attorney for Intervenor
SEIU Local 32BJ

ADDENDUM

29 C.F.R. § 102.46

Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.

(a) Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to § 102.45, any party may (in accordance with Section 10(c) of the Act and §§ 102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions. (i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) Answering briefs to exceptions. (1) Within 14 days, or such further period as

the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) Cross-exceptions and brief in support. Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) Answering briefs to cross-exceptions. Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) Reply briefs. Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

(f) Failure to except. Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

(g) Oral argument. A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(h) Filing requirements. Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

(i) Amicus curiae briefs. Amicus curiae briefs will be accepted only by permission of the Board. Motions for permission to file an amicus brief must state the bases of the movant's interest in the case and why the brief will be of benefit to the Board in deciding the matters at issue. Unless the Board directs otherwise, the following procedures will apply.

(1) The Board will consider motions to file an amicus brief only when: (a) A party files exceptions to an Administrative Law Judge's decision; or (b) a case is remanded by the court of appeals and the Board requests briefing from the parties.

(2) In circumstances where a party files exceptions to an Administrative Law Judge's decision, the motion must be filed with the Office of the Executive Secretary of the Board no later than 42 days after the filing of exceptions, or in the event cross-exceptions are filed, no later than 42 days after the filing of cross-exceptions. Where a case has been remanded by the court of appeals, the motion must be filed no later than 21 days after the parties file statements of position on remand. A motion filed outside these time periods must be supported by a showing of good cause. The motion will not operate to stay the issuance of a Board decision upon completion of the briefing schedule for the parties.

(3) The motion must be accompanied by the proposed amicus brief and must comply with the service and form prescribed by § 102.5. The brief may be no more than 25 pages in length.

(4) A party may file a reply to the motion within 7 days of service of the motion. A party may file an answering brief to the amicus brief within 14 days of issuance of the Board's order granting permission to file the amicus brief. Replies to an answering brief will not be permitted.

(5) The Board may direct the Executive Secretary to solicit amicus briefs. In such cases, the Executive Secretary will specify in the invitation the due date and page length for solicited amicus briefs, and the deadline for the parties to file answering briefs. Absent compelling reasons, no extensions of time will be granted for filing solicited amicus briefs or answering briefs.